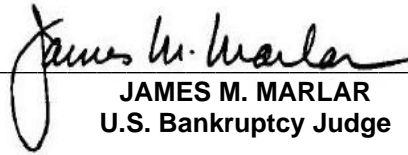


SIGNED.



Dated: July 15, 2008


JAMES M. MARLAR
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re: Chapter 7
TODD DOUGLAS HALLE and No. 0:06-bk-00244-JMM
MARLENE KAY HALLE, Adversary No. 0:08-ap-00100-JMM
Debtor(s).
JIM D. SMITH, Bankruptcy Trustee, MEMORANDUM DECISION
Plaintiff,
vs.
DEUTSCHE BANK NATIONAL TRUST
COMPANY, as Trustee,
Defendant.

Before the Court is the motion for judgment on the pleadings, or for summary judgment (Dkt. #11) filed by Deutsche Bank National Trust Company ("Deutsche Bank"). The court considered the entire file, the arguments and the legal authorities. The court's decision follows.

FACTS

The Debtors filed a chapter 7 case on September 20, 2006. Jim D. Smith was appointed trustee ("Trustee"). A residential parcel of real property was listed in the Debtors' bankruptcy schedules as having a value of \$270,000 (Schedule A). Two liens existed against the

1 parcel, both held by Option One Mortgage Corporation ("Option One"), in the scheduled total
2 amount of \$249,000 (Schedule D). The Debtors also listed a Yuma County tax lien of \$1,352.86.
3 The Debtors did not claim an Arizona homestead exemption (Schedule C).

4 Two months after the bankruptcy filing, on November 29, 2006, Option One filed a
5 motion for stay relief. Trustee was named as a party defendant, as he represented the estate's
6 interest in the property (Dkt. #15). A copy of the motion was mailed to Trustee on November 29,
7 2006. Trustee answered on December 11, 2006 (Dkt. #21), alleging, among other things, that equity
8 existed in the property.

9 Trustee also recorded a "Request for Notice and Notice of Bankruptcy" ("Request for
10 Notice") with the Yuma County Recorder's Office, on December 11, 2006. The Notice stated:

11 Jim D. Smith, Chapter 7 Bankruptcy Trustee, hereby
12 gives Notice of the Pendency of the above referenced
Bankruptcy Case, and,

13 Requests Notice of any and all scheduled Trustee's Sales
14 and Continuances thereof concerning the following Property:

15 Legal: Lot 25, Hettema Place #2
16 Address: 1860 W. 15th Street, Yuma, AZ
Assessor Parcel: 110-51-065

17 A final hearing on the Option One motion was heard on March 14, 2007, at which
18 time the court ordered the stay lifted (Dkt. #36). On March 20, 2007, the court entered the order
19 lifting the stay, and authorized Option One, as lienholder, to enforce its rights under state law
20 (Dkt. #39). That order was not appealed, and thus became final 11 days after its entry on the docket.

21 Thereafter, on July 9, 2007, the Deed of Trust was assigned to Deutsche Bank. (The
22 Assignment was recorded on August 22, 2007.)

23 On July 19, 2007, Deutsche Bank recorded a "Notice of Trustee's Sale," in the Yuma
24 County Recorder's Office. It is undisputed that Deutsche Bank also gave statutory notice by mailing
25 notice to the Debtors, posting the notice and through publication. ARIZ. REV. STAT. §§ 33-808,
26 33-809. See Reply of Deutsche Bank, at 2 n.1 (Dkt. #13). However, Deutsche Bank did not
27 apparently send notice to Trustee.
28

1 Based on this court's order, Deutsche Bank held a trustee's foreclosure sale on
2 October 19, 2007, over a year after the bankruptcy filing. At that sale, Deutsche Bank purchased
3 the property with a credit bid in the amount of \$221,005.65.

4 A "Trustee's Deed of Sale" in the name of Deutsche Bank was then recorded on
5 October 25, 2007.

6 This adversary proceeding was commenced three and one-half months after the
7 trustee's sale, in which Trustee seeks to set the sale aside on the basis that he, as the estate's
8 representative, did not receive statutory notice of the trustee's sale date.

9 10 DISCUSSION

11
12 The Arizona statutes describe what steps must be taken in order to perfect a trustee's
13 sale, ARIZ. REV. STAT. § 33-801, *et seq.*, and they are strictly construed. *Patton v. First Federal*
14 *Sav. & Loan Ass'n of Phoenix*, 118 Ariz. 473, 578 P.2d 152 (1978). But, on the other hand, if no
15 action is taken to enjoin such a sale, a purchaser who purchases the property for value without actual
16 notice of any alleged defect in notice of the trustee's sale is entitled to conclusively rely on the
17 trustee's deed recorded in his favor, *post sale. In re Hills*, 299 B.R. 581, 586 (Bankr. D.Ariz. 2002).
18 ARIZ. REV. STAT. § 33-811(B) is dispositive on this point. In pertinent part it provides:

19
20 The trustee's deed shall raise the presumption of compliance
21 with the requirements of the deed of trust and this chapter
22 relating to the exercise of the power of sale and the sale of the
23 trust property, including recording, publishing and posting of
24 notice of sale and the conduct of the sale. A trustee's deed shall
constitute conclusive evidence of the meeting of those
requirements in favor of purchasers or encumbrancers for value
and without actual notice. Knowledge of the trustee shall not be
imputed to the beneficiary.

25 (Emphasis supplied.)

26 Arizona courts have held that questions of whether a trustee's sale was properly
27 noticed are irrelevant in light of § 33-811(B). *See BAM Investments, Inc. v. Roberts*, 172 Ariz. 602,
28 604, 838 P.2d 1363, 1365 (Ct. App. 1992); *Main I Ltd. P'ship v. Venture Capital Constr. & Dev.*

1 *Corp.*, 154 Ariz. 256, 259-60, 741 P.2d 1234, 1237-38 (Ct. App. 1987). This provision has also
2 been interpreted to apply to beneficiaries of trust deeds who may purchase the property. *Id.* In its
3 motion, Deutsche Bank seeks judgment in its favor under ARIZ. REV. STAT. § 33-811(B).

4 Trustee opposes such relief and maintains that, since he had recorded a Request for
5 Notice, Deutsche Bank's failure to give him notice is grounds to set aside the trustee's sale, at least
6 as to the estate's interest.

7 ARIZ. REV. STAT. § 33-809(A) sets forth the explicit requirements for a Request for
8 Notice of a trustee's sale. Deutsche Bank aptly points out that Trustee's Request for Notice did not
9 strictly comply with the statute, in that it did not identify the particular Deed of Trust, the parties'
10 names, the date of recordation, a legal description of the property, nor was it acknowledged by a
11 notary. *See id.* As such, Deutsche Bank maintained that it did not have a statutory obligation to
12 provide notice to Trustee. Nor could it have had actual notice of any defect in its noticing
13 procedure.

14 Trustee then asserts that Deutsche Bank had actual notice of the estate's interest in the
15 property because its predecessor-in-interest, Option One, had participated in the stay relief
16 proceedings and because of Trustee's recorded Request for Notice and Notice of Bankruptcy. These
17 assertions however do not prove Trustee's point. First, Deutsche Bank did not become the assignee
18 of the Deed of Trust until four months after stay relief was granted. Second, ARIZ. REV. STAT. § 33-
19 809(D) provides that the Request for Notice that is provided for under that section does not affect
20 title to the trust property, nor can it "be deemed notice to any person that a person requesting a copy
21 of notice of sale has or claims any interest in, or claim upon, the trust property."

22 Debtors were the record owners of the property and parties to the Deed of Trust. They
23 apparently received notice of the sale, pursuant to ARIZ. REV. STAT. §§ 33-808 and 33-809. It is
24 well-established that a bankruptcy trustee stands in the shoes of his debtors. *See Smith v. Arthur*
25 *Andersen LLP*, 421 F.3d 989, 1002 (9th Cir. 2005) (stating that the trustee may bring the debtor's
26 causes of action, and citing 11 U.S.C. §§ 323, 541(a)(1) and 704(1)); 3 COLLIER ON BANKRUPTCY
27 ¶ 323.03[2] (15th ed. rev. 2008). In that regard, a trustee gains no greater rights than those of his
28 debtors. *Id.*; *In re Gatto*, 380 B.R. 88, 92 (Bankr. M.D. Fla. 2007) (citing *Zartman v. First Nat'l*

1 *Bank of Waterloo, N.Y.*, 216 U.S. 134, 135, 30 S.Ct. 368, 54 L.Ed. 318 (1910)). Therefore, the fact
2 that Trustee, as the representative of the estate, did not get notice, is irrelevant, because his Debtors
3 apparently got notice. *See Main I Ltd. P'Ship*, 154 Ariz. at 259, 741 P.2d at 1237 (a timely mailing
4 to the parties to the trust deed constitutes full compliance with the requirement for notice to
5 "persons having an interest in the property").

6 Trustee almost got it right, but his attempt at giving statutory notice fell a bit short.
7 Absent a compliant statutorily correct Request for Notice, Trustee's claim that he was entitled to
8 receive a separate notice specifically directed to him is not supported by Arizona law or the
9 Bankruptcy Code. The filing of a bankruptcy case does not impose new or additional requirements
10 beyond those required by the Arizona deed of trust statutes. *In re Stober*, 193 B.R. 5, 10 (Bankr.
11 D. Ariz. 1996) (Marlar, J.). *Accord, In re Nagel*, 245 B.R. 657 (D. Ariz. 1999); *In re Nghiem*, 264
12 B.R. 557 (9th Cir. BAP 2001), *aff'd*, 53 Fed. Appx. 489 (9th Cir. 2002) (ruling on California law);
13 *In re Hills*, 299 B.R. 581 (Bankr. D. Ariz. 2002); *Kelly v. NationsBank Mortgage Corp.*, 199 Ariz.
14 284, 17 P.3d 790 (Ct. App. 2001) (as amended). *Contra, In re Acosta*, 181 B.R. 477 (Bankr.
15 D. Ariz. 1995) (Mooreman, J.).

16 In addition, if Trustee desired that a specific notice be directed to him (rather than to
17 the Debtors), he could have recorded a request that strictly complied with the statutes.
18 Unfortunately, he did not. ARIZ. REV. STAT. § 33-809(A). There is no question that Trustee had
19 actual knowledge of Option One's lien claim and desire to foreclose from at least two sources (the
20 Debtors' schedules and Option One's motion for stay relief). The order lifting the stay specifically
21 allowed the foreclosure process to occur, and Trustee was a party to that order. Trustee is therefore
22 estopped to contend he was lacking in the knowledge that a foreclosure was imminent. He had the
23 means, motive and legal knowledge necessary to protect the estate's interest, if that interest was
24 worth preserving. Apparently, it was not.¹

25
26
27 ¹ To assuage Trustee's concerns about this issue, the court notes that the residence
28 probably had no real equity worthy of preservation, in any event. The decision to let the
property go is probably more defensible than trying to recover it at this stage. The known liens
were about \$250,000, and the property was valued in the schedules at \$270,000. A 7% real
estate commission would have been approximately \$19,000.

1 Therefore, by virtue of ARIZ. REV. STAT. § 33-811(B), the sufficiency of Deutsche
2 Bank's notice is not subject to attack, and there is no other basis presented for setting aside the
3 trustee's sale.

4
5 **CONCLUSION**
6

7 For all of the foregoing reasons, the motion of Deutsche Bank will be granted, and
8 Trustee's complaint against it will be dismissed, with prejudice. Each party will bear their own
9 costs. A separate judgment will be entered. FED. R. BANKR. P. 9021.

10
11 DATED AND SIGNED ABOVE.

12
13 COPIES served as indicated below
14 on the date signed above:

15 Jim D. Smith, Trustee
16 221 South Second Ave.
17 Yuma, AZ 85364

Email: jimmie.smith@azbar.org

18 Christopher M. McNichol
19 Gust Rosenfeld, PLC
20 201 E. Washington, Suite 800
21 Phoenix, AZ 85004-2327

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22 Office of the U.S. Trustee
23 230 N. First Ave., Suite 204
24 Phoenix, AZ 85003-1706

U.S. Mail

25 By /s/ M. B. Thompson
26 Judicial Assistant
27
28